NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

PETITION FOR WRIT OF CERTIORARI

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34 pp

QUESTIONS PRESENTED FOR REVIEW

In this case the Court of Appeals in rejecting not only various critical and dispositive findings made by the trial Court, actually created, indeed out of whole cloth, various findings of its own. The fact that the Court of Appeals, in the process of doing so, rotely credited and favored (as being supportive of its thesis) testimony provided by various police officers which had been expressly rejected by the trial Judge makes the Fourth Amendment issues in this case most worthy of the Court's consideration.

So postured, the following specific questions are submitted by this Petitioner.

I

WHETHER DUE PROCESS IS DENIED WHEN A COURT REVIEWING THE GRANT OF A MOTION TO SUPPRESS ACCEPTS AND CREDITS TESTIMONY THAT WAS EXPRESSLY REJECTED BY THE TRIAL COURT.

II

WHERE A TRIAL COURT MAKES THE EXPRESS FINDING THAT A SUSPECTED TRAFFIC VIOLATION "WAS USED AS A JUSTIFICATION FOR STOPPING AND SEARCHING THE VEHICLE AND ITS OCCUPANTS ... FOR ILLEGAL DRUGS", CAN THE SEARCH MADE IN THE WAKE OF SUCH STOP BE JUSTIFIED AS AN INVENTORY SEARCH?

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RELEVANT RULES AND STATUTES

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, **Thomas Pierce**, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on November 15, 1995, when the Supreme Court of Ohio denied further appellate review.

OPINIONS BELOW

The Opinion of the Ohio Court of Appeals, against which this Petition is directed, was issued on May 25, 1995. This Opinion is designated **Appendix "A", pp. 1 to 41**, in the Appendix to this Petition. The Order denying Reconsideration of this Opinion is designated **Appendix "B", p. 35**. The Entry of the Ohio Supreme Court denying further appellate review was entered on November 15, 1995, the critical date herein. It is designated herein as **Appendix "C", p. 36**. The Opinion of the trial Court granting the Motion to Suppress is set forth herein as **Appendix "D", p. 37**.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio, as indicated above, was entered on November 15, 1995. The jurisdiction of this Court is invoked under Title 28, U.S.C., §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

1. Fourth Amendment, United States Constitution;
2. Fifth Amendment, United States Constitution;
3. §435.11, Codified Ordinance of the City of Cleveland;
4. §4503.12(c), Revised Code of Ohio;
5. §4511.06, Revised Code of Ohio;
6. §4511.12(c), Revised Code of Ohio.

STATEMENT OF THE CASE

The critical issues in this cause were raised in the State court in a pre-trial Motion which sought the suppression and the return of illegally seized evidence. This Motion was granted by the trial Court.

The State (the Respondent herein), in the wake of an interlocutory appeal, authorized by State law, secured a reversal of the trial Court's judgment. This judgment is the one centralized in our Petition. It became final, as shown above, when the Ohio Supreme Court failed to invoke its discretionary jurisdiction.

The relevant facts here are easily stated. Petitioner and two other individuals were indicted for a number of offenses that surfaced in the wake of the arrests and the searches here being challenged. Specifically these offenses were **(1)** receiving stolen property in violation of R.C. of Ohio, §2913.51; **(2)** carrying a concealed weapon in violation of R.C. of Ohio, §2923.12; **(3)** possession of a controlled substance, to-wit: cocaine, in violation of R.C. of Ohio, §2925.03; **(4)** preparation of a controlled substance for shipment in violation of R.C. of Ohio, §2925.03; **(5)** use of a motor vehicle for the commission of a felony drug abuse in violation of R.C. of Ohio, §2925.13 and **(6)** possession of criminal tools in violation of R.C. of Ohio, §2923.24.

Next the trial Court, as the Record here shows, granted the Motion To Suppress filed by petitioner. As this formal ruling, designated herein as **Appendix "D"**, shows the Court, as was his prerogative, credited the defense evidence on the dispositive issues and rejected, expressly so, most of the testimony provided by the police.

Thus it was on the State's appeal from the grant of Petitioner's Motion that the Court of Appeals in a 2-1 decision reversed the trial Court. It is this Opinion that is here being centralized.

Significant here, the trial Court expressly credited the defense's proof in finding that the arrests here involved occurred at the point when the armed stop was made (**Appendix "D", p. 39**). The Court of Appeals in rejecting the trial Court's findings in this regard, apparently did so without realizing the compelling significance of its statement that the immediate "search" made by these officers (at gunpoint) of the car's occupants had actually occurred before the gun (found secreted under the floor mat) or the drugs (found in the trunk) were discovered. Surely the Court can be credited with knowing that any right to conduct the immediate search conducted here was dependent upon the right to make a valid arrest.

With the above insuperable thesis in mind, the majority's reasons for trying to smuggle Thomas Pierce's ultimate revelation that he was a fugitive into the relevant facts was done for such an ulterior purpose as to make for a fact of considerable significance here. In any event, the Record shows that early-on the majority started forging its various false major premises. Specifically, the reference here is to our assailment of the following artificial findings used by the author of the Opinion as premises for the false conclusion reached in his Opinion:

> In light of the testimony of Detective Petrovich that he learned through police channels that the Cutlass bore a license assigned to a Chevrolet (and [was being] operated by one with a fictitious driver's license and who was not the owner) and carrying a passenger reputed to be involved with drug trafficking; and admittedly in a high crime area, comprised sufficient justification to warrant a stop. **Opinion, Appendix "A", p. 23-24**. (Emphasis supplied.)

The grim fact here, one that is, both, indisputable

and unassailable, is that no police officer, including Detective Petrovich, was made aware before the vehicle stopped it was being "operated by one with a fictitious driver's license." (Ibid.) The proof showed the police only learned from Pierce (which could only have occurred after his *arrest*) of his fugitive status. Indeed, this revelation actually occurred *after* the gun and the contraband had been found. Simply put then, the absolute fact is Thomas Pierce only admitted to his fugitive status when it became apparent that his passengers were going to be charged with possession of the gun and the drugs that had by then been found in the car. The effort there made included petitioner stating his passengers had no knowledge of anything found in the car. In so doing, he only revealed what the police would have learned later -- i.e., that his true name was not Robert Hale, but Tommy Pierce.

Also, the facts critical to this appeal include certain significant admissions made by the State's counsel during the Hearing on the Motion to Suppress. These admissions are so binding on the State that to the extent the Court of Appeals failed to reckon with them, its Opinion is further flawed and unacceptable. Here counsel argued:

THE COURT: You are not disputing, I gather, that she [the owner of the car, Fransheria Cannon] actually was entitled to drive that vehicle with that plate on it? You are disputing whether the evidence that she had was satisfactory?

MR. SHELDON: *No, your Honor.* I'm disputing that you can't have the plates on that

vehicle without sufficient indicia of ownership in the car.

THE COURT: Well, see, my question is, did she have the right to transfer the plates -- drive that car with the plates transferred, once she purchased the other car?

MR. SHELDON: Did she have the right to transfer the plates?

THE COURT: Did she have the right to transfer the plates from her old car to the newly purchased car?

MR. SHELDON: *Yes, she had this right.*

THE COURT: So that the issue is whether or not -- whether the evidence of her right to do that was satisfactory. Isn't that what the issue is?

MR. SHELDON: No. We already decided that she had the right to do that. The question is whether or not a person, other than herself, can drive that vehicle when the plates have not yet been transferred, without sufficient indicia of ownership in this vehicle. That's the ultimate question.

THE COURT: I think we are saying the

same thing.

Tr., pp. 414-417. (Emphasis supplied.)

The upshot of the points made above is that *any position contrary* to the thrust of counsel-opposite's judicial concession (made herein by the State) that the owner of the car could indeed properly operate the car with "the plates" (with which we are here concerned) rightly should be deemed to have been waived.

Here it should be noted the State fully contended at the trial level and in the Court of Appeals that the stop made of this car was for the purpose of the officers investigating a passenger. And, that in so doing they sought to learn whether the car, which had a temporary license tag on it, was stolen.

In addressing these issues the trial Court's expressed view was that the methods employed by the police were illegal.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Reviewing Courts, including those in Ohio, must be made to understand they cannot substitute their own subjective interpretations of the evidence for those rendered by the finder-of-the-facts. Why this rule (which is not only indisputable, but) is necessary is truly vindicated here. For not unlike the Judges elsewhere, those here were overly prone to simply ignoring rulings made by the trial Judge that are amply supported by the Record and substituting their own views of the evidence.

Here the trial Judge made specific findings of fact as to the testimony presented and provided by a thorough analysis of the totality of the circumstances regarding the lawfulness of the stop, the arrests and the searches made of the petitioner and those in the car. Since the Appellate Court lacked the power to make a *de novo* determination of any of the factual issues that were resolved by the trial Court on the basis of the credibility determinations made by

him, it follows that there was no basis in the Record, and none was stated in the Opinion, for rejecting findings made by the trial Court. While the trial Court credited testimony provided by the petitioner and one of the officers, the appellate Court relied on testimony, some of which was specifically rejected by the trial Court, provided by different officers.

Stated another way, inasmuch as the trial Judge not only heard the testimony and observed first-hand the demeanor of all the witnesses and made his findings, which credited the defense evidence, it is at once apparent the Appellate Courts' reliance on the large segment of the testimony provided by Detective Walker, quoted in its Opinion (**Appendix "A", pp. 5 to 18**), is sorely misplaced and misdirected. It is also irrelevant and beside the point. This follows *unless* the Court is also holding (as appears to be the case) that a trial Judge is barred from rejecting the testimony of police officers.

Since some of us know police officers do routinely lie, see **State v. Dodson** and **State v. Hunt**, both **supra**, particularly if they are from Cleveland (see **United States v. Alexander, 740 F. Supp. 437 [1990]**), the fact that the majority of those on the Court of Appeals were unimpressed with this easily demonstrated reality does explain a lot. What should be understood here is that one of the critical findings *rejected* by the appellate Court was the insuperable and unassailable finding, made by the trial Court that the police did not have reasonable cause to believe the vehicle was improperly licensed. (**Appendix "D", Ruling on Motion to Suppress, p. 40.**)

Of course, it should also be noted, as shown elsewhere, the statement in the Appellate Court's Opinion that "the police found no evidence of car ownership" is one that can hardly be deemed worthy of being given any significance in light of the defense evidence and the

testimony by Officer McCauley that she saw the envelope that had the data in it in the car and the trial Court's findings as to the contents of that envelope. And, the Appellate Court's statement that Pierce told the officer at the scene and *before* they found the gun his driver's license was fake, falls in a lower category than the Court's statement that while "Pierce [who at that point had only identified himself as Robert Hale merely] claimed there was evidence in the glove compartment" he failed to disclose what that evidence was" (**Appendix "A", Opinion, p. 24**).

The fact that the Appellate Court recognizes that Pierce did tell the officers the necessary papers were in the glove box, where the trial Court found they were, really says all that needs to be said. Simply put, it is unreasonable to penalize the petitioner because Detectives Petrovich and Walker did not see what Officer McCauley saw, or to penalize petitioner because McCauley refused to open the envelope and look inside. It is likewise wrong to penalize Thomas Pierce for not telling them what documents he was referring to as being in the glove compartment (according to Walker, but not Pierce). For, after all, Pierce offered to get them and the officers, doubtless while venting their paranoid fear for their safety, refused to allow him to do so. With this being so, it seems any onus that was present in the context of this factual scenario was on the police, not the persons they were pointing the guns at.

This brings us to the trial Court's finding that "the police had [certain] information" (**Id., p. 24**) which they failed to act on appropriately (**ibid**). The problem with the Appellate Court's degradation of this finding is not that it is clearly erroneous, it seems the Court was simply unwilling to credit the trial Court's findings based on the defense evidence and McCauley's testimony that these documents were in the car.

Here it is worth repeating, it is up to this Court, as we see it, to explain to the Courts in Ohio that they are powerless to make findings that require it to reject factual findings made in the wake of credibility determinations made by trial Judges. And that this is so even if those determinations make it clear that the testimony of some police officer or police officers was rejected -- for whatever reasons, including the fact that in many instances they wilfully lie and in others their testimony has too many holes in it.

ARGUMENT NO. I

DUE PROCESS IS DENIED WHEN IN REVIEWING THE GRANT OF A MOTION TO SUPPRESS, THE COURT IN ADDITION TO REJECTING VARIOUS ESSENTIAL FACTUAL FINDINGS MADE BY THE TRIAL JUDGE (WHICH FINDINGS EXPRESSLY CREDITED THE DEFENSE VERSION OF THE FACTS), ACTUALLY CREDITS TESTIMONY PROVIDED BY VARIOUS POLICE OFFICERS, WHICH TESTIMONY NOT ONLY CONFLICTED WITH SUCH FINDINGS, BUT WAS EXPRESSLY REJECTED BY THE TRIAL COURT.

One reading the analysis made below will quickly realize the extent to which the author of the majority Opinion obviously believed they could reject with impunity critical and dispositive findings of fact made by the trial Judge, and that they could do this although these findings had ample factual support in the Record. Further, it shows a belief on their part that they could then substitute their own findings.

Indeed, in so doing, it is likewise clear the Appellate Court was convinced that they could premise the ultimate conclusions drawn, by them, on testimony that was expressly rejected by the trial Court. And, that this they

could do because of an apparent belief that the trial Judge was bound by the testimony he chose to reject because it had been provided by narcotic police officers.

Granted the testimony accepted by the trial Judge as premises for his dispositive rulings was provided by people in whose possession a serious quantity of drugs was admittedly found. But who would disagree the fact that drugs were found cannot be used as a basis for validating, either, an illegal arrest or an illegal search.

The Court of Appeals in rejecting the trial Court's various findings, which they did without expressly making the determination that the rejected findings were *clearly erroneous*, simply ignored the fact that the State is yet to contend Thomas Pierce was originally arrested for having a fictitious driver's license and that the search of the car was incident to that arrest. Even this is not all. The State must be credited with conceding that it was after the arrest and the searches were complete that petitioner identified himself as Thomas Pierce and indicated he was a fugitive.

With this being so, it follows the expressed predicates for the Appellate Court's reversal, of the grant of petitioner's Motion to Suppress, cannot be defended in law, logic or common sense. Nor, can it survive the contention here made that petitioner was victimized by both the police who willfully and brazenly violated his rights, *and* by Ohio's reviewing Courts. The Courts referred to not only arbitrarily rejected the trial Court's findings and substituted their own (some of which were made out of whole cloth and have actually no factual basis in the Record), they did so on the basis of non-existent legal theories and pathetic reasoning patterns.

Our confidence in the efficacy of this assailment will be borne out by the fact that no effort will be made by counsel-opposite to defend certain indefensible factual assertions made by, and relied on by, the writer of the

Majority Opinion as major premises in his pathetically constructed syllogism.

Having said that, the analysis below of the Majority Opinion seems appropriate. This is particularly so here given, both, the extreme difficulty one encounters in Ohio's Courts when they attempt to preserve the very rare grant of a Motion to Suppress in the wake of an appeal by the State. **See, e.g., State v. Dodson, 43 Ohio App. 2d 31 (1974); State v. Hunt, 22 Ohio App. 3d 43 (1984); State v. Welch, 18 Ohio St. 3d 88 (1985)** and **State v. Evans, 67 Ohio St. 3d 405 (1993)**. Cf., **Beck v. Ohio, 379 U.S. 89 (1964)** and **Doyle v. Ohio, 426 U.S. 610 (1976)**.

From this case, what one does get is some insight as to why this is so. Simply put, it is well known that our Court has never hesitated to recognize that credibility determinations are rightly made by the finder-of-the-facts. And, that such findings will not be rejected unless clearly or manifestly erroneous. However, if this case is any indication, that clearly does not appear to be what happened here. Indeed, it is obvious enough that most of the necessary predicates for the Appellate Court's dispositive theses were literally made out of whole cloth. While we submit that is bad enough, some of that Courts' findings actually clash with indisputable testimony and express findings of fact made by the trial Judge. The upshot of this fact is further augmented by the cogent tenet that the trial Record should be read in the light most favorable to the party that prevailed in the lower Court. Clearly that was not done here.

Our first specific reference is to a most critical finding made by the Appellate Court, which likewise clashes mightily with certain unequivocal testimony in the Record. Here the Record shows **Detective Roman**, the officer who issued the traffic ticket to Robert Hale (who much later turned out to be Thomas Pierce) *testified as follows*:

Q. At that time during your conversation with the defendant, did he represent himself to you as Robert Hale?

A. Yes, he did.

Q. Now, other than the ticket for .... What was the ticket that you issued to him?

A. Plates not issued to the vehicle or auto.

* * *

Q. Did you give him a copy of that ticket at the scene?

A. Yes, I did.

Q. Now on that particular ticket, is there any other name, other than Robert Hale?

A. No. There is -- the only name on there is Robert Hale that I was issuing the ticket -- *we were in the process of inventorying the vehicle to be towed, but we wouldn't -- I was told there was no confirmation on who owned the vehicle. At this time I was also informed that there was a gun in the vehicle*. So I turned around and advised them of their rights.

Q. Now did Robert Hale, at the scene, ever provide you with another name?

A. After I issued the ticket and I advised him of his rights, he told me that, in fact, he was not, in fact, Robert Hale, but that his name was Thomas Pierce.

Tr., 306-307. (Emphasis supplied.)

Clearly one can only read the above quote from the testimony of the officer (that issued the ticket) as showing that when the search of this car was started Thomas Pierce

was already under arrest *and* the officers were in the process of searching the car when the gun and the drugs were found. With this being so, the question that arises is not why was it necessary for the Court to literally manufacture in the Opinion an artificial sequence of events because the reason is apparent. Rather, the apt question is, how can it be said and factually determined to be a dispositive finding that:

> In addition, after the initial stop was made, *the police determined that the driver, Thomas Pierce*, who was not the owner ... [was] *an admitted fugitive with a fake driver's license*, was unable to produce vehicle registration, certificate of title or any other proof of ownership. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. *Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy*.

Appendix "A", Opinion, p. 22. (Emphasis supplied.) Even worse than that, how can it be said with impunity that:

> The police found no evidence of car ownership. *When the driver was asked by the (ticketing) officer for identification Pierce produced an Ohio driver license in the name of Robert Hale which Pierce admitted was a fake permit used by Pierce to evade apprehension and extradition resulting from his then status as a fugitive*.

Id., p. 24. (Emphasis supplied.)

Of course, it goes without saying that the above quoted findings, by the Court of Appeals, that Pierce admitted he was a fugitive *before* the weapon or the

contraband were found is not only flawed, artificial and totally inaccurate, as a dispositive finding it is really beyond belief. This is particularly so since the trial Court must be credited with having accepted Thomas Pierce's testimony that he only revealed his true name once they transported him to the Justice Center (**Tr., p. 375**). In other words he told them his name was Pierce at the station house.

What is significant here is the Court of Appeals was required to credit the trial Court's findings in this regard. Here too the trial Court determined that certain documents, which satisfied him, were present in the glove compartment at the time of the stop. *This finding was based on the testimony provided by Thomas Pierce and Fransheria Cannon ....*" (**Appendix "D", Ruling On Motion To Suppress, p. 23**). (Emphasis supplied.)

With this being so what is here being seriously questioned is how the required determination could be made, if it was made, that the trial Court's precise findings on these points were *clearly erroneous*. This fact places the various contrary findings by the Appeals Court in the same unacceptable category as the Court's reliance on so much of the testimony provided by Detective Walker, during his direct examination. As we see it, there is only one reason why the Appellate Court quoted a seventeen (13) page segment of Detective Walker's direct testimony which is spread over **pages 5-18** of its Opinion in the Appendix to this Petition at **Appendix "A"**. Its purpose was to have a source (albeit one that was expressly rejected by the trial Judge) for that Court's critical thesis.

Again it is worth repeating, as we see it, that the testimony relied on by the Appeals Court was heard by the trial Judge and in large measure rejected by him -- as was his prerogative. This follows since a trial Judge is not required to gospelize testimony provided by any police officer. In short, the doctrine of *falso in uno falso alterious*

applies full strength to the testimony of police officers as it does to other witnesses. Of course, it is also a fact that Detective Walker fully admitted that certain critical aspects of his testimony could not be reconciled with testimony previously rendered by him at the Preliminary Hearing on this matter.

Next, it has apparently been overlooked by our Court of Appeals, or simply not understood by those in the majority, that not only did Thomas Pierce testify contrary to certain evidence provided by Detective Walker -- **i.e.**, that Walker ran the plate and waited in his car until he got the report (an event that could only have happened *after* the stop had been made), so did Detective McCauley. Here Detective Walker testified:

> Q. The third member of this vehicle is a known reputed drug dealer in the Longwood Project area. *We decided to follow the car to see if we could find out anything further on this.* Meaning the fact that he is a reputed drug dealer in the Longwood area. Do you recall saying that?
>
> A. Yes, sir.
>
> Q. Then we ran the licence [sic] plate of the vehicle and the license plate came back listed to a vehicle which the plates were not on.[1] We pulled the car over

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[1] Only a policeman trying to justify a search made of a vehicle stopped in one of Cleveland's inner-city "hoods" would suppose that merely because the plate was not on the car it was listed to translates into a valid belief, or probable cause to believe, the car was stolen. This follows because the law allows plates to be transferred in the

at approximately Star and Addison Road. It was during this time we got out of our detective vehicles and identified ourselves as police officers. We had the vehicle surrounded. *It was during this time that McCauley -- Detective McCauley, badge 16, observed what appeared to be a gun handle protruding underneath a floor mat in the rear right seat. Do you recall giving that testimony*?

A. *I do, sir.*

Q. Now that's different; isn't it? What you are telling this Court is different from what you told that judge under oath in the Cleveland Municipal Court; isn't it?

A. It's semantics. *It's not consistent with what I say today.*

Q. Let's use a different word. Try my word. That's different.

THE COURT: He may not like your word.

BY MR. WILLIS:

Q. That's different, to say that Officer McCauley, after you surrounded the car, looked into the car and saw a gun protruding out from under a seat -- under a floor mat. That's different from saying that the people were ordered out of the car and Detective McCauley found the gun when she was taking inventory. Those two statements are

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circumstances present here. See **R.C. of Ohio, §2945.03.**

irreconcilable; aren't they?

A. They're different.

Q. Thank you. Yet both statements were given under oath?

A. Yes, sir.

Q. *Then you agree one has to be perjury if the other is the truth*?

A. *No, sir.*

MR. SHELDON: Objection.

THE COURT: He can ask that question, and he disagrees.

Tr., pp. 169-171. (Emphasis supplied.)

Significant here, it should be noted that, not only did Detective McCauley expose Detective Walker's mendacity on this salient point, her testimony was that it was *after the defendants were out of the car and secured that she then saw the gun* which had been covered by the floor mat to the rear seat (**Tr., p. 269**).

Roman's testimony was that he "waited for the listing to come back on the plate...." (**Tr., p. 316**). This wait, he testified, could have taken five (5) minutes (**ibid**). Now, no matter how this testimony is read, it can only favor Thomas Pierce. For *if* it is read that Pierce was outside the car with a gun pointing at him and the other occupants of the car were likewise out of the car (as the trial Judge found), then clearly it had to have been much later than the Appellate Court's Opinion suggests when the ticket was issued for the license plate violation. This follows if we simply credit the statement in the Opinion that Detective Petrovich was involved in the searches made of the defendants after they had been ordered out of the car (**Appendix "A", Opinion, p. 24**). For clearly if Petrovich was searching them "out of concern[] for his own safety" (**ibid**), then surely the Court will agree the five minute wait for a response to the queries about the plate had to have

occurred much later -- after these searches had been made. If not read that way, then it is at least clear that Officer Roman's testimony was irreconcilable with that of Officer Walker on when Roman got out of the car. Walker places Roman with those who ordered the defendants out of the car at gunpoint (**Tr., pp. 161-162**). His testimony further shows the police were fully engaged in searching the car when they discovered the gun and the contraband. All this occurred *before* they learned a fact the trial Judge deemed significant -- that is, that although the license plate had been issued for a different car, the person identified by Thomas Pierce as the owner did in fact own both the plates and the car as the documents in the car showed.

The above analysis, which exposes the gross flaw in the Appellate Court's ratiocinations, should suffice to lead to its total rejection. Additionally, other segments of Walker's testimony expose the folly one must engage in to accept the Appellate Court's oraculation of Walker's testimony. Here too it should be noted that Walker testified without equivocation that the Cleveland Police Department had no written policy with reference to closed containers encountered during an inventory search (**Tr., pp. 172-174**). Apart from the fact that the segment of his testimony isolated above is a reflection on his training (**ante, pp. 15-17**), the Court's failure to address the **Florida v. Wells (495 U.S. 1 [1990])**, issue is hardly something that can be ignored. For reviewing Courts are required to sustain rulings made by trial Judges if any basis exist for doing so in the Record. The reverse is not true. And, of course, when one reads Walker's testimony it shows Roman was in the cadre of officers who immediately surrounded this car with their guns drawn. Walker so testified at the Preliminary Hearing and at the trial (**Tr., 175-177**).

Simply put then, a fair distillation of the testimony by Detective Walker (that was before the trial Court, and

which the Court of Appeals deliberately failed to reckon with) shows that this officer was supposedly investigating ownership of the car when he undertook to make his searches (**Tr., p. 28**). Significant too, Walker tells us he was only one of three officers that looked in the glove box (**id., pp. 29-31**). This officer says he was looking for "a registration" (**id., p. 32**). While Detective Walker denied that Pierce had told him the car had recently been purchased, the trial Court must be viewed as having rejected the officer's testimony on this point in favor of Pierce. In other words, the trial Court determined that Pierce so advised the officers.

Next, the Record shows Walker was asked by the defense the following questions:

> Q. Officer Walker, showing what has been marked for purposes of identification as Defendant's Exhibit I, I'll ask you what is the fact as to whether or not this envelope, Exhibit I, and there's two pieces of paper which I also identify were inside the envelope and in the glove compartment, what is the fact as to whether or not they were in the glove compartment?
>
> A. *The fact is, I did not see it, sir.*

THE COURT: Let me see those, please.

BY MR. WILLIS:

> Q. Officer, I showed you Defendant's Exhibit I-1, which was the same as Defendant's Exhibit B; is that right?
>
> A. Yes, sir.
>
> Q. As being one of the items in Exhibit I, and the other item that was in Exhibit I, according to the defense, is ... what appears to be a bill of sale for a car that

was purchased from the Lease Corporation in Willoghby [sic]. Will you accept that?

A. It's here, yes, sir.

* * *

Q. Do you -- did you see either one of these items in the car?

A. No sir.

Q. For some reason he did not keep them in the car?

A. I did not see them, sir.

THE COURT: You are saying that you did not see them period or you don't remember seeing them?

THE WITNESS: I did not see them period.

THE COURT: Okay.

Id., pp. 189-190.

It is a *reasonable* inference here, in fact it was *unreasonable* for the Court of Appeals to conclude other than as the trial Court did, that these documents were in the car and in the envelope Detective McCauley was to testify she actually saw in the car. But even this is not all. If we agree the Court's prerogatives also included the right to credit the defense evidence, which was not consistent with Walker's and Petrovich's sequence of these same events, then clearly the Appellate Court's summary rejection of these findings must be deemed to have been unacceptable.

Simply put, the defense evidence, which was credited by the trial Court, shows (at the very least) that *while* Pierce and the others were being detained outside the car and had already been searched and items removed from Pierce's pockets by one of these officers, Detective Petrovich was then searching the glove box, McCauley was

searching the interior and Walker was searching the trunk. It was obviously during this interim, which had to be before he learned of the listing on the license plate, that Roman was told, as he says he was (**ante, p. 12**), that the gun had by then been found. We know this was done by Detective McCauley because she admits to having done so.

Again, the trial Court obviously believed, and must be credited with having believed, the defense's evidence (contributed by all of those in the car) that these searches commenced immediately *after* they were forced at gunpoint from the car. With this being so, the contrary conclusion was simply beyond the power of any reviewing Court to draw. Now if we are wrong in this, then the Court should have explained why this is so. In so doing the Court could have, as counsel-opposite must, reckoned with the following segment of Detective Roman's testimony. Here the Record shows:

Q. Can you relate how you became involved in that stop?

A. We were the last car in the procession when the car was pulled over. *There was a license plate run and I was sitting in the car waiting for the computer* -- the dispatcher to come back with the listing to the vehicle.

* * *

Q. Now when you approached -- first of all, did you approach the vehicle?

A. *I waited for the listing to come back on the plate.*[2] *When I got the listing back,*

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[2] As shown elsewhere Roman says he could have waited five minutes for the report to come back with the details of the plate and the cars (**ante, p. 17 & Tr., p. 316**).

that came back to a Chevy. I went and took out my ticket book, citation book.

Q. Did you issue a ticket for the improper plate?

A. Yes. *I walked up to a male that was -- that I was told*[3] *was behind the steering wheel of the vehicle and I asked him for his driver's license, and he gave me a driver's license.*

* * *

Q. At that time during your conversation with the defendant, did he represent himself to you as Robert Hale?

A. Yes, he did.

Q. Now, other than the ticket for -- strike that. What was the ticket that you issued to him?

A. Plates not issued to the vehicle or auto.

Q. Detective, handing you State's Exhibit 5 for identification, would you take a look at this document and tell me whether or not you recognize it?

A. Yes. *It's a copy of the citation I issued for -- on Star and Addison, for plates not issued for a vehicle.*

* * *

Q. Did you give him a copy of that ticket at the scene?

A. Yes, I did.

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[3] This fact further confirms that the arrest here had already occurred before the police got a listing on the car. It also verifies that the search was in actual progress when the police learned anything about the listing.

Q. Now on that particular ticket, is there any other name, other than Robert Hale?

A. No.... The only name on there is Robert Hale that I issued the ticket ....

Q. So at the scene of the crime, did you know this individual's true identity?

A. *No, I did not.*[4] *As far as I was concerned, his name was Robert Hale.*

(Tr., pp. 303-308).

Granted this witness was to later say that the revelation of the name Thomas Pierce occurred on the scene, but he was quick to add that this occurred "*[a]fter he had been informed there was a gun found in the car*" **(id., p. 308).** (Emphasis supplied.) With this being so, whether the Appellate Court rejected Pierce's testimony that he only identified himself at the station or not, one cannot overlook Walker's flawed credibility or deem it an irrelevant consideration. One should not forget Walker's original testimony was that the gun and contraband were found after Pierce had given Walker *consent* to look for the registration. Nor, should the Court have disregarded the defense evidence, most of which was expressly credited, and other segments thereof that were inferentially credited.

Now, we are aware that reviewing Courts routinely reject defense versions of the evidence when the shoe is on their other foot. Well, the shoe was on the prosecutor's foot and not unlike defendants when they are the appellant,

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[4] With this categorical testimony before it how could the Court of Appeals, even apart from the trial Court's contrary findings, openly declare that the police knew of Pierce's fugitive status and the fact that his driver's license was a fake before it made these searches?

they were simply stuck with any factual findings made, or reasonably inferable from the rulings made, against them. We understand this. We do not understand why the Appellate Court did not.

ARGUMENT NO. II

WHERE THE TRIAL COURT MAKES THE EXPRESS FINDING THAT A SUSPECTED TRAFFIC VIOLATION "WAS USED AS A JUSTIFICATION FOR STOPPING AND SEARCHING THE VEHICLE AND ITS OCCUPANTS ... FOR ILLEGAL DRUGS," IT FOLLOWS THAT ANY SEARCH MADE THEREAFTER CANNOT BE JUSTIFIED ON THE BASIS THAT IT WAS AN INVENTORY SEARCH.

If there is any thing that seems to be well settled it is the premise that for any inventory of a motor vehicle to be legal, the car must be lawfully in the possession of the police. See **South Dakota v. Opperman, 428 U.S. 364, 368-369 (1976)** and **Harris v. United States, 390 U.S. 234, 237 (1968)**.

In resolving the appeal against the petitioner, the Court in the following quote from the Majority Opinion exposes the extent to which the Court, both, misread the Record and ignored other critical and unassailable findings that were made by the trial Judge. It also shows the vast extent to which facts were artificially created to justify the *ad hoc* position ultimately expressed. Here the majority Opinion states that:

> Considering all these factors that became part and parcel of the totality of the circumstances, we conclude that the state successfully bore the burden of proof by demonstrating that the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App. 3d 126.
>
> *In the aftermath of the inventory*, a loaded gun was found in the vehicle, as well as crack cocaine and cocaine powder discovered in the trunk of the car; all of which were claimed by Pierce.

Appendix "A", Opinion, p. 28.

First off, as shown above, the conclusion that the contraband was found in this car (or even any of it) "[i]n the aftermath of the inventory" made of the car *is truly a false statement*. The same is true of the statement in the Appellate Court's Opinion that while the police were "en route" to where the car was stopped by them they "learned through the police department computer that the plates on the Cutlass" were not registered to that car. (See **paragraph 4** of the Court's analysis of the evidence, **Appendix "A", Opinion, p.26.**) Also, it is not a fact, and it was not determined by the trial Judge to be a fact, that the driver, almost immediately after being stopped, identified himself as Thomas Pierce. Indeed, the most that can be said for this is that Officer Roman testified this happened after the gun had been found; whereas petitioner (in testimony credited by the trial Judge) says he only told this to the police at the police station (**Tr., p. 375**). (Cf., **paragraph 5 of the Opinion, Appendix "A", pp. 26.**)

Paragraph 6 of the Opinion is likewise indefensibly flawed. This follows because no police officer ever testified Thomas Pierce told them he had won a Motion to Quash Evidence before. The only reference to anything of that nature occurred in response to the State's original thesis, which was that Pierce had consented to the search. It was evidence that tended to show that, not unlike most people encountered by the police, or otherwise intimidated by them, Pierce had enough sense not to consent to a search which he knew would yield, as it did, contraband.

Again in **paragraph 7**, the **Opinion (id., pp. 26-27)** makes still another gross misstatement. This follows if the Court's use of the word "after," was meant to convey to one reading the Opinion that Thomas Pierce told the police his true name was not Robert Hale before he was taken to the police station, or before they *arrested* him or even before they located the contraband. This follows because no one, we repeat, no one, testified this happened before any of these things happened.

With this being so, the statement is not merely misleading, it is more than that. With the assailment of paragraph 7 (ibid) being as compelling as it surely and indisputably must be regarded, the statement that the original arrest here of Pierce could be justified on the basis of his lack of "a valid Ohio driver's license" (**paragraph 8**), is ludicrous and totally indefensible. Proof this is so is gleaned not only from the State's failure to even suggest such a blatantly inappropriate thesis, but by the total lack of any factual frame of reference for the statement itself.

As to **paragraph 10 (id., p. 27)**, we concede it to be a fact that Petrovich and Walker testified they did not find any relevant documents in the glove box. And, their testimony could have been deemed dispositive if the State were the appellee in the Court below. But, such was not the case presented to the Court of Appeals. With this being so, the Court was required to accept the findings made by the trial Court. On this point the Record shows, beyond dispute, that the trial Court not only rejected their testimony, but he accepted that provided by Officer McCauley, Thomas Pierce and Ms. Cannon, the owner of the car. Since his findings in this regard were not only his prerogative to make, and they were not clearly erroneous, it follows the Appellate Court's Opinion to the contrary, notwithstanding, cannot survive meaningful scrutiny. This is particularly so when one considers what it conclusively

shows about the testimony of police officers in general and these officers in particular. Here the Record shows Detective McCauley gave the following evidence:

Q. Now you told us, if I remember correctly, that while inventorying this car, that you saw this envelope?

A. *I seen an envelope.*

Q. *But you didn't care to look in it?*

A. *No, I did not.*

Q. *And you didn't put anything in the inventory sheet about seeing an envelope in the car?*

A. *No, I did not.*

Q. Aren't you supposed to take the inventory to insure that false claims of theft and the like would not be alleged against the police?

A. That's correct.

Q. In other words, a person had a thousand dollars in this envelope and claimed that, and the envelope you saw had a thousand dollars in it, and when you got the car and this wasn't in the inventory, that wouldn't have served police in any way, would it, because you didn't bother to look?

A. *Two other officers had already inspected that envelope. I see no reason for me to look into it as well.*

Q. *In other words, you seen ... Mr. Keith Walker and Petrovich inspect that envelope?*

A. *Yes, I did.*

Q. What did they say to you about the envelope?

A. *They said there was nothing in there pertaining to Mr. Hale's ownership of the car.*

Q. *Well, did they say there was anything in there about anybody's ownership of the car.*

A. *Thess [sic] said there were papers that did not apply to Mr. Hale.*

Q. But did they say anything about papers that apply to Miss Fran[sheria] ... Cannon. Did they say there was a paper that applied to her ownership of the car?

A. *There was information pertaining to a 30 day tag.*

Q. A 30 day tag?

A. Yes.

Q. *In the name of Fransheria Cannon*?

A. *They didn't give me the name.*

Q. So inasmuch as they had seen the envelope and inspected the contents, *you didn't see any need to record there was an envelope in there with the leasing company name on it; right*?

A. *That's correct.*

Tr., pp. 275-277.

Also, the statement (repeated in **paragraph 13 of the Court's Opinion, Appendix "A", p. 27**]) as to when the inventory was commenced likewise must go into the dumpster. This follows for the further reason that the defendant's testimony was that the bag in the trunk was fully closed and the evidence did not show, in accordance with **Florida v. Wells**, the police had a policy of opening closed containers.

CONCLUSION

Where evidence is merely conflicting, a court of review will not substitute its judgment for that of the trier-of-fact. This tenet is almost universal. With this being so, how can it be overlooked that the trial Judge, despite *police* testimony to the contrary (which the Appellate Court doubtless preferred to credit) ruled the petitioner's Fourth Amendment rights were violated. So postured, the conclusion is really inescapable that the various findings made by the trial Court as his basis for his suppression determination provided more than an adequate basis for the Appellate Court to presume the trial Court credited the defense testimony in all the critical areas where there was conflict.

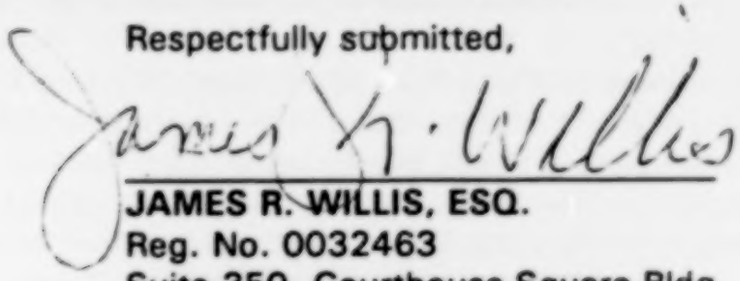
Of critical importance to any resolution of this appeal is the fact that the officers must be credited with having been aware that the law of Ohio is clear enough that:

> Transferable plates can legally be displayed on a newly acquired vehicle for a period not to exceed 30 days. After 30 days, the operator displaying transferable plates not legally transferred to the newly acquired vehicle is in violation.

Tr., pp. 112-113. Indeed, the Record shows Detective Petrovich read the memo from the Bureau of Motor Vehicles, which was a part of the documents in the envelope that was found in the car. The fact that this officer stated he would have in any event (in spite of the position of the Bureau of Motor Vehicles) towed the car because the plates were not listed to that car is hardly something the Appellate Court should have ignored. This follows for several reasons, including the fact that the trial Judge obviously factored the brazenness of this testimony and the exhibit into his resolution of the Motion to Suppress in favor of the petitioner in this case.

With this being so, absent findings that cannot be, and were not, made in the Opinion rendered by the majority in the Court of Appeals, this Court should review this cause to the end that justice can be done this petitioner.

Respectfully submitted,



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